

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

CARLO VARTINELLI,

Plaintiff,

CIVIL NO: 07-12388

DISTRICT JUDGE MARIANNE O. BATTANI  
MAGISTRATE JUDGE STEVEN D. PEPE

vs.

PATRICIA CARUSO ET AL,

Defendants.

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**ORDER GRANTING PLAINTIFF'S MOTION TO APPOINT COUNSEL (DKT. #86)**

Plaintiff filed his Complaint alleging violations of 42 U.S.C. § 1983, and the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* According to Plaintiff, while he was incarcerated in Jackson Michigan, at the Southern Michigan Correctional Facility (“SMCF”), Defendants refused to provide him with a diet free of fish, fish odor, milk, and peanut butter in violation of the Eighth Amendment. On December 31, 2008, Plaintiff moved for this Court to appoint him counsel (Dkt. #86). All pre-trial matters were referred under 28 U.S.C. § 636(b) on December 12, 2007 (Dkt. #27). For the reasons indicated below, Plaintiff’s motion is **GRANTED**.

On September 29, 2008, Judge Battani entered an order denying Defendants’ Warden Sherry Burt, Food Service Director Greg Hissong and ARUS M. Hall’s motion for summary judgment and requests for qualified immunity (Dkt. #80). In so doing, she also denied these Defendants’ requests to be dismissed as parties to this litigation. Specifically, Judge Battani found that factual issues existed relative to Plaintiff’s serious medical need and/or these

Defendants' deliberate indifference, and that these issues may not be resolved on summary judgment (Dkt. #80, p. 8).

In his latest request for counsel, Plaintiff indicates that he is unable to obtain material medical records, contracts and other evidence that are in the possession of Defendants. He also indicates he is precluded from obtaining potentially relevant complaints of medical misconduct, grievances and/or other adverse actions against the Defendants, as such materials are in the Defendants' possession. Plaintiff contends that the claims submitted by him against the Defendants involve complex medical issues and medical procedures that are beyond the Plaintiff's knowledge and skill. Without the assistance of an attorney, Plaintiff does not believe he will be able to obtain access to the material records and evidence in support of this cause of action. He believes that an attorney will be better able to adequately investigate, prepare and present Plaintiff's claims.

In both civil rights and habeas cases, prisoners have a right of meaningful access to the courts. *John L. v. Adams*, 969 F.2d 228, 232 (6th Cir.1992). Although there is generally no right to counsel in such cases, counsel may be appointed in exceptional cases. *Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir.1993). Such exceptional circumstances exist where a prisoner acting *pro se* has made a colorable claim, but lacks the means to adequately investigate, prepare or present it. *Maclin v. Freake*, 650 F.2d 885, 887 (7th Cir. 1981); *Wright v. Dallas County Sheriff Dept.*, 660 F.2d 623, 625 (5th Cir. 1981); *Stringer v. Rowe*, 616 F.2d 993, 1001 (7th Cir.1980); *Gordon v. Leeke*, 574 F.2d 1147, 1153 (4th Cir.1978); *Shields v. Jackson*, 570 F.2d 284, 286 (8th Cir.1978).

In this case, Plaintiff has presented a colorable claim, as evidenced by his ability to

survive a summary judgment motion. Accordingly, Plaintiff's motion for appointment of counsel is **GRANTED**.

The parties to this action may object to and seek review of this Order, but are required to file any objections within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72(b) and LR 72.1(d). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon the Magistrate Judge.

**SO ORDERED.**

S/STEVEN D. PEPE  
UNITED STATES MAGISTRATE JUDGE

DATED: JANUARY 13, 2009

#### CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES THAT A COPY OF THE FOREGOING ORDER WAS SERVED ON THE ATTORNEYS AND/OR PARTIES OF RECORD BY ELECTRONIC MEANS OR U.S. MAIL ON JANUARY 13, 2009.

S/V. SIMS  
CASE MANAGER

